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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 115.

THE PUBLIC SERVICE COMMISSION OF PUERTO RICO,

Petitioner,

vs.

HORACE HAVEMEYER, *et al.* (RUSSELL & Co., Sucrs., S. en C.),

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

RALPH S. ROUNDS,
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Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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Respondents.

BRIEF IN OPPOSITION TO PETITION.

Nature of the Case.

On March 8, 1929 the petitioner, The Public Service Commission of Puerto Rico, made an order (R. p. 29) cancelling that part of a franchise relating to the use of certain waters of Guanica Lake in Puerto Rico for purposes of irrigation which was granted by former Executive Council of Puerto Rico on March 19, 1901 and which, so far as concerns the use of said waters, belongs to the respondents.

The respondents appealed from that order to the District Court of San Juan under Section 78 of the Public Service Act of Puerto Rico (Act No. 70, approved December 6, 1917, Laws of Puerto Rico 1917, Vol. 2, pages 432-456, of which the important parts are printed as an Appen-

dix to the petition of the Commission). That court on June 4, 1930 rendered judgment (R. p. 67) dismissing the appeal and affirming the order.

From the judgment of the District Court the respondents appealed to the Supreme Court of Puerto Rico under Section 90 of the Public Service Act of Puerto Rico (printed at page 43 of the Appendix to the petition). That court on November 9, 1933 affirmed the judgment of the District Court (R. p. 82) with an opinion (R. pp. 70-81).

The respondents further appealed from the judgment of the Supreme Court to the United States Circuit Court of Appeals for the First Circuit under Section 240(a) of the Judicial Code of the United States as amended by the Act of February 13, 1925 (Chap. 229, 43 Stat. 938). That court on January 10, 1935 reversed the judgment of the Supreme Court and remanded the case for further proceedings not inconsistent with its opinion (R. pp. 89-104).

The Public Service Commission has filed with this Court its petition that a writ of certiorari to the Circuit Court of Appeals for the First Circuit be granted, together with a supporting brief.

By this brief the respondents oppose the granting of that writ.

Opinions Below.

The opinion of the insular District Court of San Juan (R. 49-66) is not officially reported. The opinion of the Supreme Court of Puerto Rico (R. 70-81) is reported in volume 45, *Decisiones de Puerto Rico* (Spanish edition), p. 698. It has not yet appeared in the English edition of the Puerto Rico Reports. The opinion of the Circuit Court of Appeals (R. 89-104) is reported in 74 F. (2nd) 637.

Questions Presented.

The questions presented are: Did the judicial power of the Circuit Court of Appeals for the First Circuit as a constitutional court enable it to determine whether the judgment of the Supreme Court of Puerto Rico should be upheld on the ground that the Commission's order was reasonable, or reversed on the ground that it was unreasonable? And was Russell & Company, Sucrs., S. en C., the limited partnership owning the water franchise, a party to the appeal? (See Petition, pp. 2 and 3).

ARGUMENT.

POINT I.

The Circuit Court of Appeals clearly had jurisdiction to decide the controversy presented. The controversy was that presented and decided in the two lower Courts—whether the order of the Public Service Commission should be upheld as being reasonable and hence valid, or reversed as being unreasonable and hence invalid. Reasonableness was clearly one of the tests or conditions of the validity of such an order, both by express provision of the Public Service Act of Puerto Rico and also by the recognized rule of law regarding amendment of franchises under a reserved power.

In deciding that controversy the Puerto Rican Courts and the Circuit Court of Appeals acted judicially; they did not and could not exercise any executive or legislative powers in the premises.

The language of the Circuit Court of Appeals on this point is clear (R. pp. 101, 102).

"The Public Service Act of Puerto Rico vests no legislative or executive powers in the insular courts under Sec. 85 of the Act. The District Court of San Juan on appeal has no power to change the order of the Commission. If it is not reasonable, or does not conform to the law, or is based on incompetent evidence, it can only reverse, or in its discretion remand, it to the Commission, which alone has the legislative or executive power to change it. * * *.

It is clear, we think, that under the Public Service Act of Puerto Rico, the insular courts on appeal from the Puerto Rico Commission act judicially in determining whether its orders are reasonable, are in conformity with the law, and are based on competent evidence; and the same issues, on appeal from the Supreme Court of Puerto Rico, may be raised in this court ".

The important sections, 83 and 85, of the Public Service Act of Puerto Rico are printed at page 42 of Appendix I to the petition for the writ of certiorari.

"Section 83. *Record as Evidence.*—At the hearing of the appeal the said court" (District Court of San Juan) "shall, upon the record certified to it by the Commission, determine whether or not the order appealed from is reasonable and in conformity with law."

"Section 85. *Decree of Court. How Entered.*—If the court shall upon the record find that the order appealed from is reasonable and in conformity with the law it shall enter a decree dismissing the appeal and affirming the order of the Commission. *If the Court shall upon the record find that the order appealed from is unreasonable or based upon incompetent evidence materially affecting the determina-*

tion or order of the Commission or is otherwise not in conformity with law, it may enter a final decree reversing the order of the Commission, or, in its discretion, it may remand the record to the Commission with directions to reconsider the matter and make such order as shall be reasonable and in conformity with the law. * * *" (Italics ours.)

Obviously the District Court acting under this statute upon the record below must decide, and did decide, whether as a matter of law the order was to be upheld as being reasonable, or reversed as being unreasonable. Obviously it could exercise, and did exercise, no administrative or legislative power. It could not modify the order appealed from or direct the Commission what modification to make.

On this question the Supreme Court of Puerto Rico on appeal could do no more than to determine whether the District Court had erred in—judicially—deciding that controversy and in holding that the order must be upheld as being reasonable. This the Supreme Court well understood; in its opinion (R. p. 80) it said:

> "The controversy is limited to a determination of whether such decree is reasonable or not, and whether it is in accord with the law";

and it concluded that

> "The order or decree of the Commission is reasonable and in accord with the law."

Consequently it affirmed the District Court judgment. Obviously in so adjudging that the District Court had not

erred in deciding the controversy, the Supreme Court acted judicially and not in an administrative or legislative way.

Upon appeal from the Supreme Court the Circuit Court of Appeals had to decide upon the record below whether the Supreme Court had erred in deciding—judicially—to uphold the order as reasonable. Obviously in holding, as it did, that the Supreme Court had erred and that its judgment should be reversed, the Circuit Court of Appeals acted judicially. It could not modify the order or direct the Commission how to proceed or what sort of an order to make. It could and did suggest that although its order of cancellation was unreasonable under the circumstances and thus not to be upheld, the Commission might be able to make a reasonable order amending the franchise.

The decisions of this court are perfectly clear that under such a statute as the Public Service Act of Puerto Rico the action of the Appellate Courts is judicial and not administrative or legislative.

In *Pacific Telephone Company* v. *Kuykendall,* 265 U. S. 196, this court had occasion to consider in this aspect the character of an appeal to a Washington state court from an order of the Washington Public Service Commission under a Washington statute strikingly similar to the Puerto Rican statute. This court held that such an appeal was not an administrative remedy and that in deciding such an appeal the Washington court would not "act legislatively".

This decision is decisive of our case. The court says (p. 200):

> "By the statutes of Washington (§10428, Remington's Comp. Stat. 1922), any complainant affected by

> any order of the Commission (now the Department), may within thirty days apply to the Superior Court of the proper county for a writ of review *'for the purpose of having its reasonableness and lawfulness inquired into and determined.'* The Commission certifies the record upon which the court is to enter judgment affirming or setting aside the Commission's order. If reversed for failing to receive proper evidence offered, the case is to be referred back to the Commission to receive the evidence and enter a new order. The court may remand any case reversed by it to the Commission for further action. *It is clear that the function to be performed by the Superior Court under this section is judicial.* It does not fix rates or enter a new order as to them. It does not pass on the sufficiency or weight of evidence. It only looks into the reasonableness and lawfulness of the order of the Commission and is to determine whether evidence which should have been received was rejected, and in that case is to send the case back to the Commission for a new order. *The court does not act legislatively.''* (Italics ours.)

In the later case of *Federal Radio Commission* v. *Nelson,* 289 U. S. 266 (May 8, 1933), an appeal from an order by the Radio Commission, this court, against a vigorous challenge of jurisdiction (p. 274) on the same grounds as those pressed in this case, held that as a constitutional court it could consider and decide the appeal.

In the course of his long opinion Mr. Chief Justice HUGHES said (p. 277):

> ''If the questions of law thus presented were brought before the Court by suit to restrain the enforcement of an invalid administrative order, there could be no question as to the judicial character of

> the proceeding. But that character is not altered by the mere fact that remedy is afforded by appeal. *The controlling question is whether the function to be exercised by the Court is a judicial function, and, if so, it may be exercised on an authorized appeal from the decision of an administrative body.* We must not 'be misled by a name but look to the substance and intent of the proceeding.' " (Italics ours.)

In that case, as in ours, the validity of an order by a Commission with administrative powers was in question.

In that case, as in ours, the Court could review only questions of law.

In that case, as in ours, there was no power in the appellate court to exercise discretion or dictate the action of the Commission, but only to decide whether the Commission exceeded its limitations and only to affirm or reverse.

In our case the Public Service Act of Puerto Rico, Sections 83 and 85 (above quoted), provide in effect that an order by the Commission must not be unreasonable; if unreasonable it must be reversed or remanded. In the Radio Commission case the limitation of power in the Commission was *arbitrariness* or *capriciousness;* in our case the limitation is *unreasonableness*—and as a constitutional court can pass on one limitation, so it can pass on the other.

Apart from any statute there is good authority for the rule that when under a reserved power an order is made amending a franchise, Federal Courts will determine—judicially—whether the order is unreasonable or arbitrary and, if so, will hold it invalid.

We need only quote from *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Wisconsin,* 238 U. S. 491, 501, a case regarding

sleeping car rates, where this court held that "the reserved right of altering and amending the charter of a corporation does not confer mere arbitrary power or authorize the taking of the corporation's property without compensation" (headnote). The court said:

> "In the brief of counsel for the State it is argued that the statute can be sustained as a valid exercise of the State's reserved power to alter the charter of the Company. That question does not seem to have been raised in the state court, nor was its decision based on that proposition. Indeed such a ruling would seem to have been opposed to *State ex rel. Northern Pacific* v. *R. R. Commission,* 140 Wisconsin, 157, and the *Water Power Cases,* 148 Wisconsin, 124, where it was held that the right to amend a charter does not authorize the taking of the Company's property without just compensation. The same view has been repeatedly expressed in the decisions of this court. For example in *Shields* v. *Ohio,* 95 U. S. 324, it was said that 'the power of alteration and amendment is not without limit. The alterations must be reasonable . . . and consistent with the scope and object of the act of incorporation.' . . . Again in *Stearns* v. *Minnesota,* 179 U. S. 223, 259, it was held that the reserved right to amend a corporate charter 'does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice by . . . taking of property without due process of law.' *Lake Shore &c. Ry.* v. *Smith,* 173 U. S. 690; *Stanislaus Co.* v. *San Joaquin Co.,* 192 U. S. 201; *Sinking-Fund Cases,* 99 U. S. 720; *Miller* v. *State,* 15 Wall. 498; see also *Delaware, Lackawanna &c.* v. *Board of Public Utilities,* 85 N. J. L. 28, 38, where it was held that, under such a power, the Company could not be required to furnish free transportation to certain designated officials."

It seems clear, then, that the lower courts and the Circuit Court of Appeals were deciding *judicially* whether the order should be upheld as being reasonable or should be reversed as being unreasonable. Not in any sense or to any extent were these courts deciding the question of "its wisdom from an administrative point of view"; it is not true in any sense that the question before the court was "merely a question of the wisdom of the executive authority in exercising administrative powers admittedly within its province."

It is hard to see the relevance of the petitioner's discussion of reasonableness in its Point II (Petitioner's Brief, pp. 26 to 28). The Circuit Court of Appeals having *within its jurisdiction* decided that the Supreme Court had erred in holding that the order was to be upheld as being reasonable, this Court will not review the decision as to reasonableness. The writ of certiorari is here sought on the ground that there is no "controversy" which the Circuit Court of Appeals had jurisdiction to decide—not on the ground that the court erred in deciding that the order should be reversed because arbitrary and unreasonable. In stating (Petition, p. 20) its "Reasons for Granting the Writ" the petitioner makes clear that the writ of certiorari is not sought to review a mistake of the Circuit Court as to reasonableness but only to determine definitively the "'scope of the judicial power of the United States and of the power of a constitutional court of the United States to review the action of the Public Service Commission" etc. The petitioner's statement of "Questions Presented" (Petition, p. 2) is to the same effect.

POINT II.

No question of "local law" is here involved.

This is proved by the Supreme Court opinion (R. p. 81) and the Circuit Court of Appeals opinion (R. p. 103). Each opinion shows that the Court did not consider or decide upon any question of local law but did decide on what each Court considered to be general principles, not peculiar in any way to Puerto Rico.

The construction of Acts of Congress and of the Franchise (which is, after all, a contract *carefully drawn in English*) is certainly not a matter of local law, nor is the determination of the reasonableness of the Commission's order, in view of the facts found or admitted.

Each of the cases of local law cited by counsel for the petitioner at page 29 of his brief concern some clear matter of local law or procedure, such as the Puerto Rican law of waters, very different from the American, or the construction of tax provisions of the Political Code of Puerto Rico, or the Spanish Law of prescription, or the effect of the Puerto Rican mortgage law, or the liability of one signing a note under the Puerto Rican Civil Code, or the Philippine Civil Code governing parental authority.

POINT III.

The appeal to the Circuit Court of Appeals was properly taken by the partnership "Russell & Company, Sucrs. S. en C.", the owner of the water franchise; and the partnership entity was properly before that court.

The petitioner contends that in the appeal from the Supreme Court to the Circuit Court of Appeals "the corporate entity, the Sociedad en Comandita, Russell & Co. Sucrs. S. en C., which alone appears to claim any title to the franchise involved" was absent (Petition, pp. 2 & 3), that the "appeal to the Circuit Court of Appeals really presented nothing but a moot case" (Petition, p. 30), and that the appeal being taken by the partners, the judgment in the Court below would not bind the corporate entity.

This contention is clearly without foundation.

It is impossible to improve upon the statement of the Circuit Court of Appeals overruling the similar contention made before that Court (R. p. 90):

> "It is of no importance whether the individual members of Russell & Company are parties to this appeal.
>
> The order to show cause was issued to 'Russell & Company, S en C, a limited partnership.' That company is here. Throughout the entire proceedings it has been designated as a civil agricultural partnership, or a limited partnership, as it appears it is, Secs. 125, 156 of the Commercial Code, Civil Code (1930) Sec. 1590, and every order and judgment has been against it in that capacity. It is too late now to raise the point. Russell & Company as a Sociedad en Comandita, having been proceeded against and consented to be treated in the proceedings as a civil

agricultural partnership, we think it may be considered bound by whatever judgment may be rendered."

Throughout the proceedings the intention has been clear that the partnership entity should be a party, and the Commission and all three courts have shown that they considered that the partnership entity was a party. This appears at the following pages of the Record: 1 (the title and commencement of the petition for appeal showing Horace Havemeyer, *et al.*, as partners of the civil agricultural partnership Russell & Co., Sucrs., S. en C., appellants), 16 (the order of the Public Service Commission addressed to "Russell & Company, Sucrs., S. en C."), 25 (the special apearance by "Russell & Company, Sucrs., S. en C., a civil agricultural partnership, composed of Horace Havemeyer," etc.), 26 (the answer of "Russell & Company, Sucrs., S. en C., a civil agricultural partnership organized in accordance with the laws of Puerto Rico, composed of Horace Havemeyer, Frank A. Dillingham, Frank M. Welty, Edwin L. Arnold and H. B. Orde as partners"), 29 (verification by the "attorney for Russell & Company, Sucrs., S. en C."), 50 (the District Court opinion stating that "the appellants as partners of the civil agricultural partnership Russell & Company, Sucrs., S. en C."), 51 (the District Court opinion stating that the Commission addressed its order to the "respondent Russell & Company, Sucrs., S. en C." and again at the hearing before the Commission appeared "Russell & Co., Sucrs., S. en C. (respondent)"), 53 (the District Court opinion stating the appearance of the appellants "Russell & Co., Sucrs., S. en C.") and 70 (the Supreme Court in its opinion says that "the civil agricultural partnership Russell & Company, Sucrs., S. en C. by its partners, Horace Havemeyer and others" appealed).

Indeed, by the wording of the title to the petition for the writ of certiorari counsel for petitioner himself indicates that he considers that the entity is a party; he names as respondents "Horace Havemeyer, *et al.* (Russell & Co., Sucrs., S. en C.)."

The comment of the Circuit Court in *Richardson* v. *Fajardo Sugar Co.*, 237 Fed. 195, 196, might well be repeated here:

> "Upon an examination of the entire record of the courts below, we are of the opinion that the question now raised as to the effect of the stipulation is an afterthought, and is a question not presented to the District Court or to the Supreme Court of Porto Rico."

After all, though Russell & Company is an entity for the purposes of diversity of citizenship, etc. (*Puerto Rico* v. *Russell & Co., et al.*, 288 U. S. 476) Russell & Company is a partnership and acts not by a President or Board of Directors but by its partners. How else, indeed, could this civil, agricultural partnership have appeared or participated in the proceedings on this appeal other than it has done?

CONCLUSION.

The petition for writ of certiorari should be denied for lack of any plausible reason for its granting.

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Attorney for Respondents.

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CHARLES ELMORE

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The decisions of this Court are clear that under such a statute as the Public Service Act of Puerto Rico the action of the Appellate Courts is judicial and not administrative or legislative 20

Apart from any statute it has often been held in the Federal courts that an amendment or repeal of a franchise under a reserved power must be reasonable. Federal constitutional courts often take jurisdiction to determine —judicially—whether the amendment or repeal is unreasonable or arbitrary and if so, to hold it invalid as depriving the franchise holder of its property without due process of law 26

The petitioner argues that the Commission's order of partial cancellation was a repeal and not an amendment. There can be no sound distinction between the two for the purposes of this rule, but we submit that cancellation of the water rights was in its nature and effect an amendment of the entire integrated franchise within the meaning of the authorities quoted..... 31

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POINT II:

In permitting himself to discuss the question whether the order was on the record, actually unreasonable (Petitioner's Brief, pp. 26-28) our adversary has ignored the rule that on review in *certiorari* "the only question for consideration is that stated in the petition for the writ of *certiorari*" 42

POINT III:

No question of "local law" is here involved..... 44

POINT IV:

The appeal to the Circuit Court of Appeals was properly taken by the partnership "Russell & Company, Sucrs., S. en C.," the owner of that part of the integrated Guanica franchise which refers to the use of water; and the partnership entity was properly before that court..... 48

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The power to amend, alter or repeal the Guanica franchise—as well as the power to modify and annul—was by the Organic Act of 1900 and the joint resolution and the franchise itself reserved solely to Congress and never vested in the Executive Council.... 61

By the Organic Act of 1917, Congress did not confer upon the Public Service Commission created by that Act any power or jurisdiction to exercise the power of amendment, alteration or repeal reserved by the Guanica franchise. Section 38, the only section which could be applicable, confers upon the Commission only "the executive functions relating to Public Service corporations heretofore conferred by law upon the Executive Council"; and the reserved power in the Guanica franchise does not relate to a Public Service corporation nor is it a function "conferred by law upon the Executive Council." 68

Certainly Russell & Company is not, and the Guanica Land Company, the original franchise holder, was not, "a public service corporation," and the power reserved in our franchise was not a power relating to a public service corporation, and the new Public Service Commission was not by Section 38 empowered by Congress to exercise that power 71

Nor was it a function "heretofore conferred by law upon the Executive Council"; for that reason again that power was not conferred by Section 38 upon the new Public Service Commission 76

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But even if Congress never itself conferred on the new Public Service Commission any right to amend, alter or repeal our private franchise, nevertheless, it is said, the Puerto Rican Legislature did by Section 60 of the Public Service Act passed by it in 1917 grant to the new Public Service Commission the right to exercise that reserved power.... 79

There is a two-fold answer. First, Section 60 was not intended to apply to private franchises, and second, if so intended it was to that extent invalid because of lack of power of the Legislature to enact it..... 79

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